

# Beyond Electoral Mandates—Oversight and Public Participation

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Constitutional Resilience Beyond Electoral Mandates—Oversight and Public Participation Susan Rose-Ackerman Fr 7 Dez 2018

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*The best lack all conviction, while the worst*

*Are full of passionate intensity.*<sup>1)</sup>W. B. Yeats, "The Second Coming" 1928.

These despairing lines from W.B. Yeats, written in 1928, resonate with current worries that electoral democracies in Hungary, Poland, Germany, and elsewhere are producing politicians who seek to undermine the very institutions that put them into office.<sup>2)</sup> Sławomir Sierakowski, "Interview with Adam Michnik: Europe's New Eastern Question," *Political Critique*, December 1, 2017, <http://politicalcritique.org/cee/poland/2017/ps-insider-interview-europes-new-eastern-question-slawomir-sierakowski-adam-michnik/>. On the Alternative for Deutschland, Germany's far right party, see: Jefferson Chase, "AfD: What you need to know about Germany's far-right party," *Deutsche Welle*, September 24, 2017, <https://www.dw.com/en/afd-what-you-need-to-know-about-germanys-far-right-party/a-37208199>. Countries from the United States under Donald Trump to Brazil under the forthcoming presidency of Jair Bolsonaro raise similar worries. See, for example: Ernesto Londoño and Shasta Darlington, "Jair Bolsonaro Wins Brazil's Presidency in a Shift to the Far Right," *New York Times*, October 28, 2018, <https://www.nytimes.com/2018/10/28/world/americas/jair-bolsonaro-brazil-election.html>. This paradox can afflict even established democracies. Those who win elections want to remain in power after the next election. They have an incentive to undermine the credibility of the opposition and to use the tools of political power to do so. Incumbents who aggrandize power and demonize opponents can produce situations where office holders are less and less threatened by credible organized opponents. The opposition, in turn, seeks to gain power not only by espousing alternative policies but also by questioning the integrity and competence of incumbents.

In a stable representative democracy institutional and legal constraints curb and domesticate tendencies toward autocratic power. These constraints have popular support and are a fundamental aspect of the nation state and a source of patriotic pride over and above the identities of the particular people and parties holding power. The citizenry has what Jürgen Habermas calls Verfassungspatriotismus or "Constitutional Patriotism".<sup>4)</sup> Jürgen Habermas, "Eine Art Schadensabwicklung. Die apologetischen Tendenzen in der deutschen Zeitgeschichtsschreibung, in: *Historikerstreit. Die Dokumentation der Kontroverse um die Einzigartigkeit der nationalsozialistischen Judenvernichtung*, (München, 8th edn., Piper 1991). The term was first used by Dolf Sternberger in 1979, and was developed by Jürgen Habermas in a

somewhat different sense. For an overview of the concept, its link to the German past, and its broader normative value see: Jan-Werner Müller, „On the Origins of Constitutional Patriotism“ *Contemporary Political Theory* 5:278-296 (2006). For its role in constitutional debates in Poland see Dorota Szeligowska, *The Dynamics of Polish Patriotism after 1989: Concepts, Debates, Identities*, Ph. D. Dissertation, Central European University, Budapest, Hungary, 2104. In such polities, support for incumbents would ebb away if the government tried to undermine fundamental constitutional principles—either basic institutions or the protection of rights.

If citizens do not have that attitude, however, incumbents may be able to interpret, amend or ignore the text in ways that undermine liberal democratic values. Furthermore, not all constitutional texts provide a strong institutional bulwark against autocracy. Nominal institutional checks and balances in the text are not sufficient; they have to function adequately and have to be seen by citizens as a key to political legitimacy. Comparing Hungary and Poland, Laurent Pech and Kim Scheppele write that the Polish government had to violate the constitution to achieve its aims while in Hungary it could “create an illiberal state by amending the constitution every time it was tempted to violate it.”<sup>3)</sup> Laurent Pech and Kim Lane Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU” *Cambridge Yearbook of European Legal Studies* 19: 3-47 (2017) at p. 26.

Verfassungspatriotismus played an important role in the development of the Federal Republic of Germany after the Second World War and continues to be invoked in the face of rising right-wing parties. For example, former President Joachim Gauck, both in his inaugural speech in 2013 and in a 2017 speech at the end of his term, evoked Verfassungspatriotismus as an everyday reality designed to uphold the values embedded in the German constitution.<sup>5)</sup> During his end of term speech on 18 January 2017, Gauck referred to Habermas’ concept of Verfassungspatriotismus: <http://www.bundespraesident.de/SharedDocs/Reden/DE/Joachim-Gauck/Reden/2017/01/170118-Amtszeitende-Rede>). He addressed the rising fear of right-wing tendencies and appealed to the society to stand up jointly to fight for the values enshrined in the constitution. He described Verfassungspatriotismus not only as a theoretic concept developed by scholars, but also as a concept of everyday reality (Lebenswirklichkeit). He also referred to the concept in his inaugural speech on 23 March 2013 (available here, in English: <http://www.bundespraesident.de/SharedDocs/Reden/EN/JoachimGauck/Reden/2012/03/120323-Swearing-In-Ceremony.html>).

But we need to be more specific. What institutions are important checks on the autocratic tendencies of incumbents, how do they work, and how might determined politicians undermine these institutions in their own interest? Are there notable weaknesses in the constitutional structures of Hungary and Poland and even in the German Grundgesetz that make them vulnerable when popular support for particular individuals and parties clashes with liberal democratic values. I focus here on several that are important but that have not often been the focus of commentary. These are of two kinds: first, institutions of “horizontal accountability”,<sup>6)</sup> Guillermo O’Donnell, “Horizontal Accountability in New Democracies,” in Andreas Schedler, Larry Diamond,

and Marc F. Plattner, eds., *The Self- Restraining State: Power and Accountability in New Democracies* (Boulder CO: Lynne Rienner, 1999). and second, those that enhance the democratic legitimacy of policymaking procedures inside the executive branch.

The first, horizontal, category, includes, not only the courts—including the prosecutorial service and specialized administrative or subject matter courts—but also oversight institutions such as ombudsmen, supreme audit offices, electoral commissions, anti-corruption commissions, and media oversight bodies. The second category obligates the executive to give public reasons for its policies. It links the democratic legitimacy of delegated executive and agency policymaking to procedures for gathering the views of the public and of organized stakeholders such as business, labor, and civil society, outside of the political party framework. If, in contrast, ordinary citizens and civil society organizations are not part of the policymaking process, they may lose confidence in these processes and become disillusioned with democracy. Of course, other factors such as job market prospects, income and wealth levels,<sup>7)</sup> See Maurizio Bussolo, Maria E. Dávalos, Vito Peragine, and Ramya Sundaraam, *Toward a New Social Contract: Taking on Distributional Tensions in Europe and Central* (Washington DC: World Bank Group, 20180) available at:

<http://documents.worldbank.org/curated/en/202171468299130698/Towards-a-new-social-contract>, pp. 189-196 . Maps 4.1 and 4.2 on pages 192-193 document the way at-risk poverty measures correlate with votes for extremist parties in Hungary and Poland. the quality of daily life, and the level of security and trust in others may overshadow individuals' views of government policymaking legitimacy, but perceptions of government inclusiveness, honesty and competence will likely affect citizens' views of the legitimacy of those who exercise power.

My basic claim, which builds on my research in Hungary and Poland, is that the transition to democracy and the market in these countries underemphasized reforms that would involve citizens and civil society groups in reforming the delivery of government services and the regulation of the market economy.<sup>8)</sup> Susan Rose-Ackerman, *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (Cambridge UK: Cambridge University Press, 2005).

Reforms tended to respond to European Union mandates, not reflect domestic concerns. Levels of distrust in both national governments and in EU institutions remain high.<sup>9)</sup> But see, Demos, *Nothing to Fear but Fear Itself* (London: Demos, 2017) <https://www.demos.co.uk/wp-content/uploads/2017/02/Nothing-to-Fear-but-Fear-Itself-final-short.pdf> . This British think-tank report on public attitudes, showed that Polish citizens have far more trust in the European Commission than citizens in France, Britain or Germany—almost 60% compared with 35-40% (p.37). However, 60% of Poles distrusted their national governments, more than citizens of Germany and Britain (p.38). (The French were particularly distrustful of their government). Even when there were strong policy arguments for certain reforms, citizens often viewed them as imposed from outside in an almost colonial relationship. Sociological studies document perceptions of the unfairness of the allocation of wealth during the transition.<sup>10)</sup> György Csepeli, Antal Orkény, Mária Székelyi, and Ildikó Barna, "Blindness to Success: Social Psychological Objectives Along the Way to a Market Economy in Eastern Europe,"

in János Kornai, Bo Rothstein, and Susan Rose-Ackerman, eds., *Creating Social Trust in Post-Socialist Transition* (NY; Palgrave Macmillan, 2004) pp. 213-240. These perceptions may have opened the door for the victory of authoritarian parties in recent years.

At first, the constitutions of Hungary and Poland were the old socialist constitutions amended and given legal bite.<sup>11)</sup> Poland first made temporary amendments to the socialist constitution, called the Small Constitution of 1992 and then promulgated a new constitution in 1997,

[https://www.constituteproject.org/constitution/Poland\\_1997.pdf](https://www.constituteproject.org/constitution/Poland_1997.pdf). On the socialist roots of the first post-transition Hungarian Constitution see Peteri Zoltan "Constitution Making in Hungary" *Acta Jur. Hng.* 36: 149 (1994), p.153. Eventually, Poland and Hungary issued new constitutions in 1997 and 2011, respectively. In Poland the new document retained some features of the socialist past.<sup>12)</sup> On the socialist roots of the post-transition Polish Constitution see Daniel Cole, "Poland's 1997 Constitution in Its Historical Context" (Indiana University Maurer School of Law, Paper 589, 1998) pp. 28-30. In Hungary the 2011 constitution reflected Viktor Orbán's efforts to entrench his legacy in institutions and aspirational statements.<sup>13)</sup> Hungarian Constitution of 2011, [https://www.constituteproject.org/constitution/Hungary\\_2011.pdf](https://www.constituteproject.org/constitution/Hungary_2011.pdf). See also András Bozóki and Dániel Hegedűs "An externally constrained hybrid regime: Hungary in the European Union", *Democratization* 25 (7): 1173-1189 (2018).

The Constitutional Courts in Hungary and Poland have not been much concerned with enhancing the public accountability of executive policymaking. At first, most of the justices appointed to the new constitutional courts had private law backgrounds to avoid those tainted by association with the prior regime. This meant that few had experience in public law issues related to state functioning. These justices might aggressively protect the rights of the individual, but they had little interest in the institutional framework or democratic legitimacy of policymaking in the executive.<sup>14)</sup> Rose-Ackerman, 2005, pp. 64-70. Going forward, to the extent that current governments have compromised these courts' independence, the justices are unlikely to pursue those institutional concerns in the present. Both countries are left with weak checks on executive power.

Of course, much of the public law of the socialist period was not appropriate for the new market-dominated states that emerged. But the process of reform did not produce a legal/political system strongly committed to public involvement in government policymaking. In part, that was a legacy of the socialist past where public "participation" often meant "volunteer" projects that ate into individuals' scarce free time on weekends and holidays. The "civil society" groups that existed were umbrella bodies sanctioned by the state, such as the Young Pioneers, Birdlife in Hungary and Gesellschaft für Natur und Umwelt (GNU) in East Germany, and societies for women and the elderly.<sup>15)</sup> On the role of the Young Pioneers in GDR society see: Emmanuel Droit "From Identity to Appearances: Clothing and Political Identity in the GDR. The Case of the Young Pioneers' Neckerchief (1949-1989)" (Berlin, *Revue d'histoire moderne & contemporaine*. No. 59, Vol. 2(2), pp. 108-143; On the "voluntary" associations in Hungary before 1990: Rudolf Andorka "Changes in Hungarian Society Since the Second World War" (Macalester International, Vol. 2, Article 12, 1995), pp.127-

128; also: European Commission “Study on Volunteering in the European Union, Country Report Hungary”, 2010, p. 1

[http://ec.europa.eu/citizenship/pdf/doc1024\\_en.pdf](http://ec.europa.eu/citizenship/pdf/doc1024_en.pdf); European Commission “Study on Volunteering in the European Union, Country Report Poland”, 2010, p. 1

[http://ec.europa.eu/citizenship/pdf/national\\_report\\_pl\\_en.pdf](http://ec.europa.eu/citizenship/pdf/national_report_pl_en.pdf). The GNU mater merged with its West German counterpart to become Naturschutzbund Deutschland e. V. (NABU) which today the biggest and most influential society promoting environmental protection.) After the transition, a number of new groups arose, some supported by outside funding, for example, the Environmental Management and Law Association and World Wildlife Fund. However, with low personal incomes and little tradition of private philanthropy, the local organizations presently struggle to survive and to push their reform agendas.<sup>16)</sup> Rose-Ackerman, 2005, pp. 163-191; European Commission Country Report Hungary, 2010, p. 1,11,12 and Country Report Poland, 2010, p. 1.

Furthermore, the type of civil-society involvement that most easily came to mind during the transition was a corporatist model derived from labor/management committees, as exist in Germany. This model can be useful in some contexts, especially if the organizers are willing to extend the definition of “union” broadly—for example, to include a group representing pensioners in a debate over pension reform, as happened in Poland. But such a search for stakeholders could freeze membership in policy advisory groups at the point of transition. Early efforts in Hungary and Poland to reform labor laws included associations of workers and firms that became increasingly unrepresentative as the economic basis of society changed. For example, in Hungary a union of university professors and an association of small cooperative businesses served on the committee advising the government for many years although they represented increasingly small shares of the economy.<sup>17)</sup> The discussion here derives from Rose-Ackerman, 2005, pp. 131-137. Furthermore, labor union membership is currently about 10% in both countries, down from the already low totals in the recent past. Thus, dialogues on labor/management issues with unions and employers have often been unrepresentative of both labor and management.<sup>18)</sup> The latest official statistics of 2015 show only 9% of workers in unions. See Edit Németh; Rainer Girndt *Zwischen Resignation und Aufbruch – Aktuelle Entwicklungen bei den ungarischen Gewerkschaften* (Budapest:Friedrich Ebert Stiftung Studie 2018), pp. 1,7. In Poland membership is 10% according to CBOS Polish Public Opinion Research Center, *Trade Union Membership and Opinions about their activities* (2013), summary in English: [https://www.cbos.pl/EN/publications/reports/2013/062\\_13.pdf](https://www.cbos.pl/EN/publications/reports/2013/062_13.pdf) , p.1; full report: <http://library.fes.de/pdf-files/bueros/budapest/14574-20180919.pdf> , p.7. These percentages represent a steep drop from 2002 when the percentages were estimated at 20-25% in each country (Rose-Ackerman, 2005, pp.131-137). Even if the government seeks advice from outside, the composition of the groups is often hard to defend. This situation means that when autocratic trends emerged out of political parties nominally committed to democracy, there were only a few counterweights with sufficient credibility, organizational stability, expertise, and funding to push back effectively.

Bodies with explicit oversight functions exist in Hungary and Poland. However, they have had difficulty maintaining independence and competence. The controversy over court-packing in the Polish Constitutional Court is well known,<sup>19)</sup>The developments are

outlined in the blog posts of Maciej Kisilowski in *Politico*.

<https://www.politico.eu/author/maciej-kisilowski/>. See, for example, "Poland: Authoritarian, Not Patriotic," November 28, 2017. See also Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU" *Cambridge Yearbook of European Legal Studies* 19: 3-47 (2017) at but efforts to undermine other oversight bodies are ongoing and some date from well before the current crisis. Any parliamentary system would have structural difficulties with independent oversight bodies because of parliamentary sovereignty.<sup>20</sup>)An overview of Hungarian and Polish oversight institutions as of 2005 is in Rose-Ackerman, 2005, pp. 55-99. Even in Poland, with its separately elected president, independent bodies are not always independent enough to provide effective oversight. Ombudsmen and Comptrollers General are single individuals reporting to the parliament. Even if they can only be removed "for cause", they have fixed terms and budgets that depend upon the parliament. A supra-majority may be required to appoint a replacement, but that may leave the office vacant for an extended time. Thus, in Hungary one ombudsman's office remained vacant for months as parties vied to appoint a friendly candidate.<sup>21</sup>)Rose-Ackerman, 2005, p. 80-81. Conversely, under one-party control, the government can appoint a pliable flunky, as has recently happened in Hungary, where previous incumbents had good reputations for independence.<sup>22</sup>)The ombudsman's official name is the Commissioner for Fundamental Rights (Alapvető jogok biztosa). Eva Balogh "László Székely, the new ombudsman", May 05, 2014, Hungarian Spectrum, <http://hungarianspectrum.org/2014/05/12/laszlo-szekely-the-new-ombudsman/>. The comptroller is a Fidesz operative. See: "Hungarian State Audit Office's Assault on Democracy," Free Press, January 9, 2018, <http://hungarianfreepress.com/2018/01/09/the-hungarian-state-audit-offices-assault-on-democracy/>, and "Strangely the Hungarian State Audi Office is Satisfied with Air Quality," Levegő Munkacsoport, January 30, 2018, <https://www.levego.hu/en/news/magyarorszag-az-egyik-legrosszabb-levegoju-europai-oroszag-de-az-asz-elegedett/>

Multi-member bodies provide a stronger constraint on autocrats if terms are long and staggered, but the longer the autocrat stays in power the less of a constraint exists. Of course, the appointment process could be depoliticized with a committee of professionals selecting the members. This approach has been used to select judges in a number of countries, although here too the political and business connections of those on the committee can undermine its independence, and their influence may be opaque and hard for the public to counteract.

In short, the institutions for public participation and for independent oversight have serious weaknesses in both Hungary and Poland. Some of the weaknesses are structural and embedded in each country's constitutional frameworks. Others are linked to the transition from the socialist past. In the transition from socialism, administrative law lacked a democratic imprimatur and could provide only a weak check on government policymaking. Natural law and the protection of rights provided important protections for individuals but did little to help create the institutions of a functioning regulatory/welfare state. Remnants of the past have created tensions. For example, public providers of health care and education have been under pressure as

limited resources clashed with rising expectations, creating corrupt workarounds. The socialist governments' undermining of civil society left Hungary and Poland with political parties but weak not-for-profit and advocacy sectors. Like most of Western Europe, labor unions only represent a minority of the workforce. Formal institutions of oversight such as ombudsmen and audit offices have, at times, provided checks, but they are vulnerable to capture by determined autocrats seeking to avoid oversight.

Germany with its strong national government and civil society organizations should have more space to push back against authoritarian tendencies, although its federal structure may lead to pockets of democratic authoritarianism that will be difficult to control. However, dissatisfaction with the transition has also been prevalent in eastern Germany where the laws of the Federal Republic were simply extended to cover the region. After reunification, bookshops in East Berlin stopped stocking Marx and added shelves of Federal Republic statutory texts so the new citizens would know the rules that now governed their lives. Even though the imposition of Bundesrepublik law went along with massive financial subsidies, resentment remained.<sup>23)</sup> Philip Oltermann "‘Revenge of the East’? How anger in the former GDR helped the AfD", *The Guardian*, September 28, 2017, <https://www.theguardian.com/world/2017/sep/28/is-germanys-election-result-the-revenge-of-the-east> also: Steffen Kröhnert, Reiner Klingholz "Not am Mann: Von Helden der Arbeit zur neuen Unterschicht? Lebenslagen junger Erwachsener in wirtschaftlichen Abstiegsregionen der neuen Bundesländer", (Berlin, Berlin-Institut für Bevölkerung und Entwicklung 2007). The Constitutional Court and the other specialized courts extended their jurisdiction to the East. The Basic Law was applied without formally promulgating a new constitution. Some analogize reunification to a takeover under which one legal system replaced another. However, that belief may be exaggerated. Stephen Jaggi argues that the revolutionary ideas of citizens' movements in the East, as institutionalized in the Roundtable Draft Constitution, had an impact. He claims that the timing of the passage of Article 20a of the Grundgesetz, establishing environmental protection as an objective state goal, reflects that influence.<sup>24)</sup> Stephan Jaggi, *The 1989 Revolution and Its Impact on Unified Germany's Constitutional Law: The Forgotten Revolution?* (Oxford: Nomos/Hart, 2016), pp. 162-170) Although Article 20a was the only formal amendment with such a connection, his assessment of Constitutional Court decisions in the areas of land reform, gender equality, abortion, and housing finds that they incorporate ideas prominent in the East among opponents of the DDR regime into an "intergenerational synthesis" that helped to produce a unified German state.<sup>25)</sup> *Id.* at pp. 171-236. The concept of Intergenerational Synthesis derives from Bruce Ackerman, *We the People, Foundations* (Cambridge MA; Harvard University Press, 1991).

So far the European Union has been of little help in counteracting democratically chosen leaders with authoritarian platforms. Although a vote in the EU Parliament in September did condemn Hungary's anti-democratic behavior by a two-thirds vote, the ultimate effect of that move remains in doubt. (Patrick Knight and Steven Erlanger, "Hungary's Democracy in Danger, E.U. Parliament Decides," *New York Times*, September 14, 2018. For more background see Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU" *Cambridge Yearbook of European Legal Studies* 19: 3-47 (2017) (criticizing EU responses and suggest some legal responses). András

Bozóki and Dániel Hegedűs “An externally constrained hybrid regime: Hungary in the European Union”, *Democratization* 25 (7): 1173-1189 (2018). They call Hungary a “hybrid regime” and argue that “the EU functions as both “regime sustaining” and “regime constraining”, in ways that are “regime legitimizing” for Hungary” p.1174. The actions that the EU might take—economic sanctions and limits on EU voting rights—are unlikely to have a major effect and might even backfire if they stoke local resentments. Those who voted for authoritarian leaders could vote them out under the right conditions, but those with power are working to make that difficult. The task for reformers is to make a space for candidates effectively to challenge incumbents, to enhance the role of oversight institutions, and to encourage public participation in policymaking. The goal is to move states toward institutions that evoke “constitutional patriotism” and that undermine demagogic appeals. This is not an easy task given the self-reinforcing nature of shifts toward authoritarianism. My hope is that those living through the troubling developments in Hungary, Poland, and Germany can provide some fresh ideas for a constructive way forward. Perhaps those regional experiences can also help worried liberal democrats in the Philippines, Brazil, and even the United States.

## References [ ± ]

1.   ↑   W. B. Yeats, “The Second Coming” 1928.

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2.   ↑   Sławomir Sierakowski, “Interview with Adam Michnik: Europe’s New Eastern Question,” *Political Critique*, December 1, 2017, <http://politicalcritique.org/cee/poland/2017/ps-insider-interview-europes-new-eastern-question-slawomir-sierakowski-adam-michnik/>. On the Alternative for Deutschland, Germany’s far right party, see: Jefferson Chase, “AfD: What you need to know about Germany’s far-right party,” *Deutsche Welle*, September 24, 2017, <https://www.dw.com/en/afd-what-you-need-to-know-about-germanys-far-right-party/a-37208199>. Countries from the United States under Donald Trump to Brazil under the forthcoming presidency of Jair Bolsonaro raise similar worries. See, for example: Ernesto Londoño and Shasta Darlington, “Jair Bolsonaro Wins Brazil’s Presidency in a Shift to the Far Right,” *New York Times*, October 28, 2018, <https://www.nytimes.com/2018/10/28/world/americas/jair-bolsonaro-brazil-election.html>.

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3.   ↑   Laurent Pech and Kim Lane Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU” *Cambridge Yearbook of European Legal Studies* 19: 3-47 (2017) at p. 26.

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4.   ↑   Jürgen Habermas, “Eine Art Schadensabwicklung. Die apologetischen Tendenzen in der deutschen Zeitgeschichtsschreibung, in: *Historikerstreit. Die Dokumentation der Kontroverse um die Einzigartigkeit der nationalsozialistischen Judenvernichtung*, (München, 8th edn., Piper 1991). The term was first used by Dolf Sternberger in 1979, and was developed by Jürgen Habermas in a somewhat different sense. For an overview of the concept, its link to the German past, and its broader normative value see: Jan-Werner Müller, „On the Origins of Constitutional Patriotism” *Contemporary Political Theory* 5:278-296 (2006). For its role in constitutional debates in Poland see Dorota Szeligowska, *The Dynamics of Polish Patriotism after 1989: Concepts, Debates, Identities* Ph. D. Dissertation, Central European University, Budapest, Hungary, 2104.

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5. ↑ During his end of term speech on 18 January 2017, Gauck referred to Habermas' concept of *Verfassungspatriotismus*: <http://www.bundespraesident.de/SharedDocs/Reden/DE/Joachim-Gauck/Reden/2017/01/170118-Amtszeitende-Rede>). He addressed the rising fear of right-wing tendencies and appealed to the society to stand up jointly to fight for the values enshrined in the constitution. He described *Verfassungspatriotismus* not only as a theoretic concept developed by scholars, but also as a concept of everyday reality (*Lebenswirklichkeit*). He also referred to the concept in his inaugural speech on 23 March 2013 (available here, in English: <http://www.bundespraesident.de/SharedDocs/Reden/EN/JoachimGauck/Reden/2012/03/120323-Swearing-In-Ceremony.html>).
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6. ↑ Guillermo O'Donnell, "Horizontal Accountability in New Democracies," in Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder CO: Lynne Rienner, 1999).
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7. ↑ See Maurizio Bussolo, Maria E. Dávalos, Vito Peragine, and Ramya Sundaraam, *Toward a New Social Contract: Taking on Distributional Tensions in Europe and Central* (Washington DC: World Bank Group, 2018) available at: <http://documents.worldbank.org/curated/en/202171468299130698/Towards-a-new-social-contract>, pp. 189-196. Maps 4.1 and 4.2 on pages 192-193 document the way at-risk poverty measures correlate with votes for extremist parties in Hungary and Poland.
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8. ↑ Susan Rose-Ackerman, *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (Cambridge UK: Cambridge University Press, 2005).
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9. ↑ But see, Demos, *Nothing to Fear but Fear Itself* (London: Demos, 2017) <https://www.demos.co.uk/wp-content/uploads/2017/02/Nothing-to-Fear-but-Fear-Itself-final-short.pdf>. This British think-tank report on public attitudes, showed that Polish citizens have far more trust in the European Commission than citizens in France, Britain or Germany—almost 60% compared with 35-40% (p.37). However, 60% of Poles distrusted their national governments, more than citizens of Germany and Britain (p.38). (The French were particularly distrustful of their government).
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10. ↑ György Csepeli, Antal Orkény, Mária Székelyi, and Ildikó Barna, "Blindness to Success: Social Psychological Objectives Along the Way to a Market Economy in Eastern Europe," in János Kornai, Bo Rothstein, and Susan Rose-Ackerman, eds., *Creating Social Trust in Post-Socialist Transition* (NY: Palgrave Macmillan, 2004) pp. 213-240.
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11. ↑ Poland first made temporary amendments to the socialist constitution, called the Small Constitution of 1992 and then promulgated a new constitution in 1997, [https://www.constituteproject.org/constitution/Poland\\_1997.pdf](https://www.constituteproject.org/constitution/Poland_1997.pdf). On the socialist roots of the first post-transition Hungarian Constitution see Peteri Zoltan "Constitution Making in Hungary" *Acta Jur. Hng.* 36: 149 (1994), p.153.
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12. ↑ On the socialist roots of the post-transition Polish Constitution see Daniel Cole, "Poland's 1997 Constitution in Its Historical Context" (Indiana University Maurer School of Law, Paper 589, 1998) pp. 28-30.
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13. ↑ Hungarian Constitution of 2011, [https://www.constituteproject.org/constitution/Hungary\\_2011.pdf](https://www.constituteproject.org/constitution/Hungary_2011.pdf). See also András Bozóki and Dániel Hegedűs "An externally constrained hybrid regime: Hungary in the European Union", *Democratization* 25 (7): 1173-1189 (2018).
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14. ↑ Rose-Ackerman, 2005, pp. 64-70.
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15. ↑ On the role of the Young Pioneers in GDR society see: Emmanuel Droit "From Identity to Appearances: Clothing and Political Identity in the GDR. The Case of the Young Pioneers' Neckerchief (1949–1989)" (Berlin, *Revue d'histoire moderne & contemporaine*. No. 59, Vol. 2(2
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16. ↑ Rose-Ackerman, 2005, pp. 163-191; European Commission Country Report Hungary, 2010, p. 1,11,12 and Country Report Poland, 2010, p. 1.
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17. ↑ The discussion here derives from Rose-Ackerman, 2005, pp. 131-137.
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18. ↑ The latest official statistics of 2015 show only 9% of workers in unions. See Edit Németh; Rainer Girndt *Zwischen Resignation und Aufbruch – Aktuelle Entwicklungen bei den ungarischen Gewerkschaften* (Budapest:Friedrich Ebert Stiftung Studie 2018), pp. 1,7. In Poland membership is 10% according to CBOS Polish Public Opinion Research Center,*Trade Union Membership and Opinions about their activities* (2013), summary in English: [https://www.cbos.pl/EN/publications/reports/2013/062\\_13.pdf](https://www.cbos.pl/EN/publications/reports/2013/062_13.pdf) , p.1; full report: <http://library.fes.de/pdf-files/bueros/budapest/14574-20180919.pdf> , p.7. These percentages represent a steep drop from 2002 when the percentages were estimated at 20-25% in each country (Rose-Ackerman, 2005, pp.131-137).
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19. ↑ The developments are outlined in the blog posts of Maciej Kisilowski in *Politico*. <https://www.politico.eu/author/maciej-kisilowski/>. See, for example, "Poland: Authoritarian, Not Patriotic," November 28, 2017. See also Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU" *Cambridge Yearbook of European Legal Studies* 19: 3-47 (2017) at
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20. ↑ An overview of Hungarian and Polish oversight institutions as of 2005 is in Rose-Ackerman, 2005, pp. 55-99.
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21. ↑ Rose-Ackerman, 2005, p. 80-81.
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22. ↑ The ombudsman's official name is the Commissioner for Fundamental Rights (Alapvető jogok biztosa). Eva Balogh "László Székely, the new ombudsman", May 05, 2014, Hungarian Spectrum, <http://hungarianspectrum.org/2014/05/12/laszlo-szekely-the-new-ombudsman/>. The comptroller is a Fidesz operative. See: "Hungarian State Audit Office's Assault on Democracy," Free Press, January 9, 2018, <http://hungarianfreepress.com/2018/01/09/the-hungarian-state-audit-offices-assault-on-democracy/> , and "Strangely the Hungarian State Audi Office is Satisfied with Air Quality," Levegő Munkacsoport, January 30, 2018, <https://www.levegő.hu/en/news/magyarorszag-az-egyik-legrosszabb-levegoju-europai-oroszag-de-az-asz-elegedett/>
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23. ↑ Philip Oltermann "'Revenge of the East'? How anger in the former GDR helped the AfD", *The Guardian*, Sepember 28, 2017, <https://www.theguardian.com/world/2017/sep/28/is-germanys-election-result-the-revenge-of-the-east> also: Steffen Kröhnert, Reiner Klingholz "Not am Mann: Von Helden der Arbeit zur neuen Unterschicht? Lebenslagen junger Erwachsener in wirtschaftlichen Abstiegsregionen der neuen Bundesländer", (Berlin, Berlin-Institut für Bevölkerung und Entwicklung 2007).
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24. ↑ Stephan Jaggi, *The 1989 Revolution and Its Impact on Unified Germany's Constitutional Law: The Forgotten Revolution?* (Oxford: Nomos/Hart, 2016), pp. 162-170) Although Article 20a was the only formal amendment with such a connection, his assessment of Constitutional Court decisions in the areas of land reform, gender equality, abortion, and housing finds that they incorporate ideas prominent in the East among opponents of the DDR regime into an "intergenerational synthesis" that helped to produce a unified German state.(( *Id.* at pp. 171-236. The concept of Intergenerational Synthesis derives from Bruce Ackerman, *We the People, Foundations* (Cambridge MA; Harvard University Press, 1991).
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25. ↑ *Id.* at pp. 171-236. The concept of Intergenerational Synthesis derives from Bruce Ackerman, *We the People, Foundations* (Cambridge MA; Harvard University Press, 1991). So far the European Union has been of little help in counteracting democratically chosen leaders with authoritarian platforms. Although a vote in the EU Parliament in September did condemn Hungary's anti-democratic behavior by a two-thirds vote, the ultimate effect of that move remains in doubt. (Patrick Knight and Steven Erlanger, "Hungary's Democracy in Danger, E.U. Parliament Decides," *New York Times*, September 14, 2018. For more background see Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU" *Cambridge Yearbook of European Legal Studies* 19: 3-47 (2017) (criticizing EU responses and suggest some legal responses). András Bozóki and Dániel Hegedűs "An externally constrained hybrid regime: Hungary in the European Union", *Democratization* 25 (7): 1173-1189 (2018). They call Hungary a "hybrid regime" and argue that "the EU functions as both "regime sustaining" and "regime constraining", in ways that are "regime legitimizing" for Hungary" p.1174.

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